NO. 20851

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

On May 6, 1964, appellant was indicted in four counts by the Federal Grand Jury for the Southern District of California, Central Division, for aiding and abetting the robbery of four national banks in violation of Title 18, United States Code, Sections 2113(a) and 2 [C. T. 2]. 1/ Following a jury trial before the Honorable Wm. M. Byrne, United States District Judge, from July 14, 1964, to July 15, 1964, appellant Lonnie Johnson was found guilty of all

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1/ "C. T." refers to Clerk's Transcript.

counts [C. T. 20].

Appellant was convicted and sentenced on August 3, 1964, to the custody of the Attorney General for eight years on each count, the sentences to run concurrently [C. T. 27].

There was filed for appellant, on February 4, 1966, a Notice of Appeal [C. T. 28]. The late notice of appeal was allowed by Judge Byrne in a written order [C. T. 29-33], based upon the finding that his (appellant's) attorney "defrauded him of the opportunity to appeal, by failing to file a notice of appeal" [C. T. 32, lines 9-11].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Sections 2113(a) provides:

> "(a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or the presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; . . . .

* * *

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Title 18, United States Code, Section 2, provides:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

III

QUESTIONS PRESENTED

1. Whether appellant was in custody within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964).

2. Whether appellant waived the right to have a Jackson v. Denno, 378 U.S. 368 (1964) hearing outside the presence of the jury.

IV

STATEMENT OF FACTS

On the four days referred to in the indictment, July 16, 1963, July 18, 1963, July 22, 1963, and August 12, 1963, Leslie Lawrence, aka Paul Leon Lawrence, robbed four banks in the Los Angeles area [Ex. 1 found at C.T. 18-19]. All moneys taken were in the care and custody of banks which were national banks whose deposits were insured by the Federal Deposit Insurance Corporation [Ex. 1].

Appellant Lonnie Johnson, during the robberies was not seen by any employees of the subject banks in the bank building or on the premises owned by the bank.

Leslie Lawrence was arrested in October 1963 for the bank robberies. In that same month, appellant was taken to the Los Angeles Police Department for questioning in connection with the theft of certain screens from a shed [C. T. 74, 90]. While there he stated that he knew Lawrence. Appellant was questioned by FBI agents concerning the bank robberies but denied having helped Lawrence commit them [C. T 53-54]. Thereafter in early April 1964, appellant was taken into custody in Bakersfield on a State charge of forgery [C. T. 94]. On April 12, 1964, he was transported to Los Angeles for questioning in connection with the instant bank robberies, since Leslie Lawrence had named him as his accomplice [C. T. 59-60, 94]. Appellant was questioned by FBI Agent Schlatter and Los Angeles Police Detective Rafferty and he admitted having driven Lawrence to two of the robbed banks [C. T. 44]. Later that day appellant was taken by Rafferty and Schlatter to the county jail for a confrontation with Lawrence, at which time appellant admitted to having driven Lawrence to and from all four of the instant bank robberies, and to having written hold-up notes [C. T. 45-50]. On April 14, 1964, appellant was again interviewed by FBI agents regarding the bank robberies and made similar admissions [C. T. 50-52].

The agents testified that on all occasions when they questioned appellant, they warned him of his constitutional rights, e. g., to

remain silent and to have counsel [C. T. 41, 43-44, 54, 78]. They stated that at no point did appellant request counsel [C. T. 41, 44, 62].

Appellant testified that he asked for counsel on April 12, 1964 but was told, "You will get one later" [C. T. 95-96]. He denied having made admissions concerning the bank robberies [C. T. 97-98, 101-102].

V

ARGUMENT

A. APPELLANT'S MATTER WAS NOT IN THE ACCUSATORY STAGE AT THE TIMES INTERVIEWED BY LAW ENFORCEMENT OFFICIALS.

When appellant was questioned relative to the instant bank robberies, and he admitted his participation, the case was not in the accusatory stage within the rule of Escobedo v. Illinois, 378 U.S. 478 (1964). While he was in physical custody at the time of his questioning, it was for an unrelated crime [C. T. 94]. Up until the date of April 12, 1964, there was nothing to link appellant to the robberies other than uncorroborated information received from Lawrence [C. T. 58]. The investigation was, objectively, in the investigation stage, and, therefore, the rule of Escobedo did not apply.

B. APPELLANT WAIVED ANY RIGHT HE MAY HAVE HAD TO A JACKSON v. DENNO, 378 U.S. 368 (1964) HEARING.

The trial in the present case commenced on July 14, 1964, soon after the decision in Escobedo v. Illinois, 378 U.S. 478 (June 22, 1964).

At the beginning of the testimony of FBI Agent Schlatter, defense counsel, at the point where Schlatter was about to go into conversations with appellant, raised an objection [C.T. 19]. At the bench, and outside the hearing of the jury, counsel for the defendant asked for a hearing, before the judge alone, to question the officers relative to whether or not appellant was denied counsel within the rule of the Escobedo case [C.T. 20].

However, a short time after the request, defense counsel stated [C.T. 23]:

> "From my reading of the Escobedo case, it prompts me to say that my objection at this time might be somewhat earlier than I should make it, because I don't know exactly what the testimony of Officer Schlatter will be . . . ."

After some further discussion between counsel and the Court concerning, inter alia, the meaning of Escobedo, Judge Byrne went on, at C.T. 27-28 to agree with defense counsel's withdrawal of the request for a hearing and stated:

> "Perhaps you are right when you said, in

your initial statement, that perhaps this might not be the time to make the objection. We will see what the testimony is, see what is testified to by the officers, and the testimony of the defendant himself."

After the testimony of the law enforcement personnel was admitted, and both sides rested, the defense, at C. T. 147, moved to exclude their testimony on the ground that appellant had been denied counsel. The motion was denied [C. T. 148].

The cases indicate that, like most rights, the right to a Jackson v. Denno, 378 U.S. 368 (1964), hearing may be waived. See Minnesota v. Tahash, 364 F.2d 922, 927 (8th Cir. 1966); United States v. Taylor, 374 F.2d 753, 756 (7th Cir. 1967). Here the defense made a request, withdrew it, and the Court accepted the withdrawal of the request. The record thus shows a classic waiver of a known right. 2/

Moreover, even if the Court were to find that there was no waiver and that a hearing was required, it is submitted that a remand for the purpose of determining whether appellant was denied counsel during the interviews would be the proper remedy. Boles v. Stevenson, 379 U.S. 41 (1964). Although the judge did not submit to the jury the precise question whether the appellant had requested

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2/ We do not contend that the right to a Jackson v. Denno hearing was unavailable because the claim of inadmissibility of the confessions was based on an alleged failure to accord the defendant a Sixth Amendment right. See Boles v. Stevenson, 379 U.S. 41 (1964); Tucker v. United States, 375 F.2d 363, 367 (8th Cir. 1967).

and been refused counsel, [3] the record shows no objection to the instructions given. In fact, at C. T. 180, appellant's counsel stated there was no objection "to any instructions given or the omission of any instructions". In these circumstances appellant cannot object to the failure of the judge to instruct the jury to determine whether appellant was denied counsel following a request. See, e.g., Dickey v. United States, 332 F. 2d 773, 778 (9th Cir. 1964), Phillips v. United States, 334 F. 2d 589 (9th Cir. 1964).

CONCLUSION

For the above stated reasons, the Judgment of Conviction should stand.

Respectfully submitted,

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[3] The judge did charge that an admission must be found beyond a reasonable doubt to have been made "voluntarily and understandingly" [C. T. 171-172].

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW